

Before the
New Hampshire Physical Therapy Governing Board
Concord, New Hampshire 03301

In The Matter Of:
Michael P. Hogan, PT
License No.: 3075
(Adjudicatory/Disciplinary Proceeding)

Docket No.: 05-2011

FINAL DECISION AND ORDER

Before the New Hampshire Physical Therapy Governing Board ("Board") is an adjudicatory/disciplinary proceeding in the Matter of Michael P. Hogan ("Respondent" or "Mr. Hogan") in Docket Number 05-2011.

Background Information:

The Respondent was selected for an audit regarding his continuing education courses. The Respondent did not respond to the Board's requests for information. Subsequent to an investigation, on September 27, 2011, the Board issued a Notice of Hearing scheduled for November 16, 2011. On October 24, the Respondent requested a continuance which was granted. The Board issued an order on November 1, scheduling the hearing for December 21, 2011. This hearing indeed occurred on December 21, 2011.

On Wednesday, December 21, 2011, at 2:00 p.m., the Board commenced with the adjudicatory/disciplinary hearing in the above captioned matter. Board members present¹ were:

Ronald Fuller, PTA, Chairperson and Presiding Officer
Laurie Clute, Physical Therapist Member
Martha B. Aguiar, Public Member
Nicole Lavoie, Physical Therapist Member
Lea Bruch, Public Member

The prosecution was represented by Hearing Counsel Attorney Jason Reimers of the Administrative Prosecutions Unit ("APU") of the Office of the Attorney General. Mr. Hogan appeared pro se.

¹ These same Board members also deliberated and voted on this Final Decision and Order.

The following exhibits were introduced into evidence and accepted into the record:

- Hearing Counsel's exhibits: 1-5.
- The Respondent's exhibits: A-B

Findings of Fact:

The Board heard testimony from Tina Kelley, the Administrator of the Office of Licensed Allied Health Professionals which includes the Physical Therapy Governing Board. The Board finds Ms. Kelly's testimony at the hearing was professional, forthright and credible.

The Board also heard testimony from the Respondent. The Respondent's witness, one Rebecca Fucci, also testified before the Board.

In light of the testimony and exhibits, the Board finds the following facts:

1. The Board first granted Michael P. Hogan, PT, a license to practice physical therapy on September 21, 2005. The Respondent held license number 3075. The Respondent's license status is current.²
2. In accordance with his regular renewal cycle and RSA 328-F:18, the Respondent renewed his license in December 2010.³ In accordance with RSA 328-A:15-a and Phy 402.04, the Respondent

² On March 16, 2011, the Board issued an order revoking the Respondent's license pursuant to RSA chapter 161-B – Support of Dependant Children. See RSA 161-B:11, IV and V. That proceeding/revocation has had no bearing on the current matter before the Board. At the time of the hearing in this matter, the Respondent's license was revoked pursuant to RSA 161-B:11. Subsequent to the hearing, the Respondent provided documentation pursuant to RSA chapter 161-B to lift the revocation.

Though the Respondent's license was revoked at the time the notice of hearing was issued and at the time the hearing was held, the Respondent's license was current at the time of the alleged violations of the current matter pending before the Board. The Board has the authority to pursue the investigation, conduct a hearing, and impose disciplinary sanctions if necessary, because the Respondent held a valid license at the relevant points in time. See Appeal of Rowan, 142 N.H. 67, 75 (1997).

³ Although the Respondent's renewal application was initially rejected by the Board's office claiming insufficient continuing education hours (Exhibit 1) due to a prior disciplinary settlement agreement with the Board, the Respondent explained how this was an erroneous rejection (Exhibit A), and the renewal application was accepted (Exhibit 1). The Respondent's license was renewed in a timely fashion so that it did not lapse or expire between the expiration date of his old license on December 31, 2010 and his renewal which started a two-year license period on January 1, 2011. The prior case is likewise not at issue here and is not considered by the Board.

provided a list of the continuing competence education courses he completed since the issuance of his last renewal on his renewal form ("2010 renewal form"). See RSA 328-A:15-a, I(b)⁴ and Phy 402.04 (h)⁵.

3. At each renewal cycle, the Board has an obligation to audit ten (10) percent of its renewal licensees for compliance with continuing education competence. See Phy 402.08(a)⁶. The Board's office has a computer program, L2K, which chooses ten percent of renewed licensees at random.

4. The Respondent was chosen at random for an audit of his continuing education hours.

5. On January 10, 2011, the Board's office mailed a letter to the Respondent stating, in relevant part, that he "must provide proof of your participation in the courses reflected on the 2010 renewal form" by February 28, 2011. Exhibit 2. See also Phy 407.01.⁷ The letter was addressed to the Respondent at the address, a post office box in Plymouth, that the Respondent listed on his 2010 renewal form. The Board's January 10 letter was not returned to the Board's office.

6. The Respondent never responded to the Board's January 10, 2011 letter.

7. On March 2, 2011, the Board's office mailed a second letter to the Respondent marked in capitals and bold "second notice." Exhibit 3. The letter again informed the Respondent that he was being audited and required his response by March 14, 2011. Exhibit 3. This letter was also addressed to the post office box in Plymouth that the Respondent listed on his 2010 renewal form. The Board's March 2 letter was also not returned to the Board's office.

8. The Respondent never responded to the Board's March 2, 2011 letter.

⁴ "Persons licensed as physical therapists are eligible for renewal of their licenses if they:... Meet any continuing education and continuing competency requirements established by the board in rules adopted pursuant to RSA 541-A."

⁵ "The renewal applicant shall use the designated columns to report the following information about each continuing professional education course or professional activity constituting maintenance of continuing competence completed since the issuance of the initial license or the last licensure renewal:"

⁶ "The board shall select on a random basis 10% of the renewal applications submitted in each renewal year for an audit of completion of the maintenance of continuing competence required by Phy 406.01."

⁷ Phy 407.01 states: "(a) A licensee shall retain documentation of maintenance of continuing competence. (b) The renewal applicant shall furnish the copies of documentation of continuing competence activities set forth in Phy 406.02 through Phy 406.16 only when requested to do so by the board in connection with an audit."

9. On March 16, 2011, the Board's office mailed a third letter to the Respondent. Exhibit 4. The letter again informed the Respondent that he was being audited and required his response by March 28, 2011. Exhibit 4. This letter was also addressed to the post office box in Plymouth that the Respondent listed on his 2010 renewal form. This letter was mailed both via regular (first-class) and certified mail. The Board's March 16 letter that was sent certified mail was returned to the Board unclaimed. Exhibit 5. The Board's March 16 letter that was sent first class mail was not returned to the Board's office.

10. The Respondent never responded to the Board's March 16, 2011 letter.

11. On September 27, 2011, the Board issued a Notice of Hearing in this matter. The Notice of Hearing was mailed both via regular (first-class) and certified mail to the post office box in Plymouth that the Respondent listed on his 2010 renewal form. The Notice of Hearing that was sent first class mail was not returned to the Board's office. The Notice of Hearing that was sent certified mail was claimed by the Respondent.

12. The Respondent testified that he received both copies of the Notice of Hearing.

13. The Respondent does not contest that the Board has properly mailed the January 10, March 2, and March 16 letters.

14. The Respondent does not contest that he has not responded to the Board's audit requirements.

15. The Respondent's defense is that he had not received the Board's letters.

16. The Respondent's witness, Ms. Fucci, is the owner of the post-office box in Plymouth that the Respondent had listed on his renewal application. Ms. Fucci and the Respondent have signed paperwork allowing the Respondent to receive mail in Ms. Fucci's post office box.

17. The Respondent has gone through an acrimonious divorce with his ex-wife. The Respondent has had ongoing child custody issues with his ex-wife.⁸

⁸ The Board takes notice of this fact through its March 2011 revocation order due to child support issues.

18. The Respondent's ex-wife works in the Plymouth post office.
19. The Respondent and Ms. Fucci testified that they believe the Respondent's ex-wife has tampered with their mail.
 - a. The Respondent and Ms. Fucci testified that they believe that the Respondent's ex-wife has access to Ms. Fucci's post-office box in Plymouth due to the Respondent's ex-wife's employment at that postal facility.
 - b. Ms. Fucci testified that she had mail that "went missing" including court documents. She further testified that she had told this to the Plymouth postmaster and that she told him that she suspected the Respondent's ex-wife had taken her mail. Ms. Fucci testified that the Plymouth postmaster "disciplined and reprimanded" the Respondent's ex-wife. Ms. Fucci stated that the Respondent's ex-wife then stopped working at the Plymouth post office and the "issues stopped."
 - c. Ms. Fucci testified that she did not file a written complaint with the Plymouth postmaster. Ms. Fucci testified that she has no written proof that the Respondent's ex-wife was "disciplined and reprimanded."
 - d. Neither the Respondent, nor Ms. Fucci, provided documentation or any other evidence from the Plymouth postmaster or any other Plymouth postal worker concerning: (1) complaints that Ms. Fucci's mail being tampered; (2) complaints that the Respondent's mail was being tampered; (3) allegations that the Respondent's ex-wife had tampered with mail; (4) the Respondent's ex-wife's "discipline."
 - e. Rather, the Respondent testified that his ex-wife is currently ("back") working at the Plymouth post office delivering mail on Saturday mornings.
20. The Respondent also testified that he filed an on-line complaint with the US Postal Service.

- a. The Respondent submitted a copy of the complaint. Exhibit B.
- b. The Respondent did not submit any documentation or other evidence that he actually sent this complaint or that this complaint was received by the postal service.
- c. The Respondent testified that he has not received a response from the postal service regarding the complaint, nor has he contacted them to follow up on the complaint.
- d. Ms. Fucci testified that she believed that the tampering with her mail started in February 2011. She testified that the issue was resolved, and that her mail has been delivered properly since mid-April 2011.
- e. As stated above, the Board issued the Notice of Hearing in this matter on September 27, 2011.
- f. The Respondent purportedly filled out the on-line complaint form in October 2011, less than three weeks later. Exhibit B.
- g. The Respondent claims that his populated response to the question: "When did the misconduct/wrongdoing occur?" which is: "It appears the letters went missing between January and August 2010." contains a typographical error and should state "2011" and not "2010."

21. It appears that the Respondent's ex-wife has continually worked for the US Postal Service throughout the relevant time period. Either at the Plymouth post office or at another location. The Respondent confirmed that his ex-wife is currently working out of the Plymouth post office.

- a. The Board specifically asked where it should send correspondence to the Respondent after the hearing. The Respondent replied that the Board should continue to send mail to the same post office box in Plymouth. The Respondent testified that he had no reason to believe that his mail would be tampered with.

22. At the hearing, the Board was mindful that if indeed the Respondent had not received his mail, this would be a significant mitigating circumstance. The Board was also concerned that the allegation of mail tampering is a serious federal offense. Accordingly, at the conclusion of the hearing, the Board left the record open for two weeks, until January 6, 2012, to allow the Respondent to provide additional evidence.

23. On January 10, 2012, the Board received a letter from James R. Cooper, Postmaster, United States Post Office in Plymouth, NH.

- a. This letter does confirm that Ms. Fucci has lodged a complaint to him.
- b. However, it cites the complaint as a joint complaint from Ms. Fucci and Mr. Hogan.
- c. This letter does not state when this complaint was lodged.
- d. It appears that this may have been a new complaint lodged subsequent to the Board's hearing on December 21, 2011.
- e. This letter only confirms that the complaint was that the Respondent's ex-wife was privy to information not available under FOIA. ("... filed a complaint with my office that private information was being provided to an individual not listed as having access on their PO Box and not requesting the information under the provisions of the Freedom of Information Act.").

- f. The letter further states:

Upon receiving this accusation from the above named box holders, I called the accused into my office and presented her with the information provided to me by the accusers. Specifically, she was asked how she had obtained the address of the above named box holders. She stated that she had obtained the address from public court documents that were a part of her divorce proceedings from Mr. Hogan and was able to provide me, on a separate occasion, documentation from the court supporting her claim.

- g. Further, the letter starkly contrasted the testimony that the Respondent's ex-wife was disciplined and reprimanded. ("No further action was taken.").

Rulings of Law:

Applicable Laws:

RSA 328-F:23 Disciplinary Action states in pertinent part::

II. Misconduct sufficient to support disciplinary proceedings shall include:

(a) Knowingly or negligently providing inaccurate material information to the board or failing to provide complete and truthful material information upon inquiry by the board, including during the process of applying for a license, license renewal, and license reinstatement.

(j) Violation of any provision of this chapter, of any governing board's practice act or rule adopted pursuant to RSA 541-A, or of any state or federal law reasonably related to the licensee's authority to practice or ability to practice safely.

Phy 402.08 Audit Procedure states:

(a) The board shall select on a random basis 10% of the renewal applications submitted in each renewal year for an audit of completion of the maintenance of continuing competence required by Phy 406.01.

(b) Audited renewal applicants who reported on the renewal application form that they completed maintenance of continuing competence before December first of the renewal year shall:

- (1) Submit proof in the form of the documentation described in Phy 407; and
- (2) Do so no later than February 1 of the year following the renewal year.

(c) Audited renewal applicants who reported on the renewal application form that they anticipated completing maintenance of continuing competence between December 2 and December 31 of the renewal year shall:

- (1) Comply with (b) above; or
- (2) If the opportunity to complete maintenance of continuing competence was foreclosed by cancellation of the continuing professional education or professional opportunity, submit by February 1 of the year following the renewal year:
 - a. Proof of the cancellation of the opportunity; and
 - b. Proof in the form of documentation described in Phy 407 of having substituted other continuing professional education or professional activity for the cancelled opportunity.

(d) If the board observes that the documents submitted pursuant to (b) or (c) above do not support the renewal applicant's claim of maintenance of continuing competence, the board shall review the possibility that the renewal applicant made an error on the renewal application form or in submitting documents.

(e) In making the review called for by (d) above the board shall seek further information from the renewal applicant if doing so will aid in the review.

(f) If, having completed the review required by (d) above, the board believes that the renewal applicant made an error in reporting or in submitting documents and did not intentionally falsely report maintenance of continuing competence, the Board shall:

- (1) Require correction of the error; or
- (2) If the error cannot be corrected, suspend the renewed license.

(g) If, having completed the review required by (d) above, the board believes that the renewal applicant has intentionally falsely reported maintenance of continuing competence, the board shall commence a disciplinary adjudicative proceeding in the manner required by Ahp 209.01.

(h) An individual whose renewed license has been suspended pursuant to (f)(2) above, after a hearing pursuant to (g) above or on the basis of a settlement pursuant to Ahp 214, shall not practice physical therapy until the suspended license has been reinstated by the board.

Rulings:

The Board makes the following findings by a preponderance of the evidence:

1. Even assuming that the Respondent had not received the Board's January 10, March 2, and March 6 letters, the Respondent admitted to timely receiving the Board's September 27 Notice of Hearing, which alleged that he failed to provide the Board with the supporting documentation of his continuing education.
2. As of the date of the hearing on December 21, 2011, the Respondent still had not provided such documentation.
3. The Respondent's rational for not providing the audit documentation in a timely manner are contradictory, self-serving and lack credibility.
4. The Respondent has not provided any rationale for not providing the audit documentation after receiving the Notice of Hearing.
5. As of the date of the Board's January 2012 meeting, when it reviewed the additional submission by the Respondent, the Respondent still had not provided the audit documentation.
6. The Board finds that the Respondent has violated RSA 328-F:23, II (a).
7. The Board finds that the Respondent has violated Phy 402.08.
8. The Board finds that the Respondent has violated RSA 328-F:23, II (j).

Disciplinary Action:

Based upon the Findings of Facts and Rulings of Law above, the Board has voted to order the following disciplinary sanctions pursuant to RSA 328-F:23, IV:

IT IS ORDERED that the Respondent is REPRIMANDED.

IT IS FURTHER ORDERED that the Respondent is assessed an ADMINISTRATIVE FINE in the amount of five hundred dollars (\$500.00) due within thirty (30) days of the effective date of this Order. The payment shall be made in the form of a money order or bank check made payable to "Treasurer, State of New Hampshire" and delivered to the Board's office at the Office of Allied Health Professionals, 2 Industrial Park Drive, Concord, NH 03301.

IT IS FURTHER ORDERED that the Respondent license is suspended for a minimum of fifteen (15) days from the effective date of the order as further defined below; this suspension shall only be lifted by further order of the Board. The pre-condition to lifting this suspension is: providing the audit documentation for the Board's review – the proof of the Respondent's participation in the courses reflected on his 2010 renewal form.

IT IS FURTHER ORDERED that within ten (10) days of the effective date of this order, as further defined below, the Respondent shall furnish a copy of this order to any current employer for whom the Respondent performs services as a physical therapist or work which requires a PT degree and or PT license or directly or indirectly involves patient care, and to any agency or authority which licenses, certifies or credentials physical therapists, with which the Respondent is affiliated.

IT IS FURTHER ORDERED that within one (1) year of the effective date of this order, as further defined below, the Respondent shall furnish a copy of this order to any employer to which the Respondent may apply for work as a physical therapist or work in any capacity which requires a PT degree and or PT license or directly or indirectly involves patient care, and to any agency or authority which licenses, certifies or credentials physical therapists, with which the Respondent is affiliated.

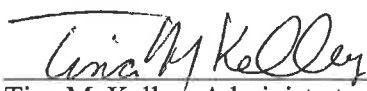
IT IS FURTHER ORDERED that the Respondent's failure to comply with any terms or conditions imposed by this Final Decision and Order shall constitute unprofessional conduct pursuant to RSA 328-F:23, and a separate and sufficient basis for further disciplinary action by the Board against the Respondent.

IT IS FURTHER ORDERED that this Final Decision and Order shall become a permanent part of the Respondent's file, which is maintained by the Board as a public document.

IT IS FURTHER ORDERED that this Final Decision and Order shall take effect as an Order of the Board on the date an authorized representative of the Board signs it.

*\BY ORDER OF THE NEW HAMPSHIRE
PHYSICAL THERAPY GOVERNING BOARD

Date: February 16, 2012



Tina M. Kelley, Administrator
Authorized Representative of the
Physical Therapy Governing Board

*\ Board members recused: Robert Brunton

